United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1012 ORIGINAL.

74-1012 74-1012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

LEON SEGAN,

Plaintiff-Appellant,

-against-

DREYFUS CORPORATION, MARINE MIDLAND BANKS, INC., DREYFUS MARINE MIDLAND MANAGEMENT CORP., INTERNATIONAL TELEPHONE AND TELEGRAPH CORP., LAZARD FRERES & CO., HOWARD STEIN, RICHARD A.M.C. JOHNSON, JULIAN M. SMERLING, LAWRENCE M. GREENE, FELIX G. ROHATYN, ANDRE MEYER AND THE DREYFUS FUND, INC.,

Defendant-Appellees.

On Appeal From the United States District Court,
For the Southern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

KAPLAN, KILSHEIMER & FOLEY
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TABLE OF AUTHORITIES

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Defendants-Appellees.

This brief is submitted by appellant in reply to some of the contentions offered by the appallees in their various briefs.

1. We have submitted that the requirement for particularized pleading under Rule 9(b) F.R.Civ.P. is satisfied by pleading of ultimate fact which inform the defendants of the plaintiff's claim in sufficient detail to enable them to answer. In fact, in the present case there never has been a claim by any defendant that they would have any difficulty in answering the Complaint.

However, appellees do challenge the validity of distinguishing between ultimate fact and evidentiary details. (Brief of Dreyfus Corp. et al., pp. 18-19).

In doing so appellees appear to challenge the cases which we had cited, not on the basis of the legal principles for which we rely upon them, but rather on the basis of the eventual outcome of those cases. Such eventual outcome, of course, was due entirely to the peculiar facts of those cases and therefore, in that respect, they are not relevant here.

This Court has consistently accepted pleadings of ultimate fact as adequate under Rule 9(b) F.R.Civ.P. The recent decision in Schlick v. Penn-Dixie Cement Corporation (2nd Cir., 1974) 507 F2d 374 is particularly in point.

In the Schlick case, as here, a defendant was alleged to have used its position of control for its own enrichment. Id. at p. 376. Failure to disclose these self-serving activities in a proxy statement, again, as happened here, was the basis of a further charge. Id. at p. 377.

In Schlick, as here, the controlling defendant was charged with utilizing for its own benefit, the assets of the controlled entity, without compensation. Id. at p. 378. Finally, in Schlick, as here, the controlling defendant was alleged to have caused the controlled entity to purchase certain securities on the open market under circumstances which generated a benefit to that defendant. Id. at p. 379.

This was the type of particularization which justified the general charges of fraud and deceipt in Schlick. Obviously this is ultimate fact pleading and it is adequate. As was stated in Schlick, "Rule 9 must be construed in conjunction with Rule 8 - - - and a complainant is not required to plead evidence."

2. Since the filing of our original brief two decisions have come to our attention which do not merely agree with, but go well beyond our contentions respecting pleading on information and belief. It will be recalled that we have demonstrated the basis of our information and belief by allegations contained in our Complaint and its verification. We adhere to that contention.

However, it appears that such explanations of a basis are no longer required in this Circuit.

The decision of this Court, in Felton v. Walston & Co. (No. 74-1581), dated December 23, 1974, has not as yet been reported. In that case the entire Complaint, as to all defendants, was pleaded upon information and belief. See Appendix to Felton case on file in this Court, page 489A. In oral argument before Judge Bonsal, in Felton, counsel for Marine Midland Banks itemized the failure to state the basis for such information and belief as his first of several objections based on Rule 9(b).

See Felton Appendix, p. 536A. Judge Bonsal, in dismissing the Complaint noted that "(t)he amended complaint's allegations are made 'on information and belief' contrary to Rule 9(b)". See, Felton Appendix ,p. 562A.

On appeal the non-existence of a basis for information and belief was repeatedly brought to this Court's attention. See brief of defendants Marine Midland Banks et ano. at pp. 9 and 10; also, brief of defendants Riesenbach et al. at p. 6.

Nonetheless, without any finding that a basis for information and belief had been stated, this Court upheld the Complaint as to some of the d.fendants. We submit that this could not have occurred if the law of this Circuit still required the pleading of the basis for information and belief in a Complaint.

This is not a strained or unusual reading of Felton. Indeed it has already been cited as authorithy for this view by a lower Court. Attached hereto, as an exhibit, is a copy of an otherwise unpublished opinion of Judge Metzner in Weber v. Reynolds Securities Inc., et al. in which, on the basis of Felton, it was held that "allegations of fraud on information and belief without stating the basis therefore are proper in this circuit".

To the extent that this is inconsistent with Segal v. Gordon, 467 F2d 602, it would appear to be

inescapable that Segal has been overruled or significantly modified by a subsequent case (Felton).

3. The appellees, perhaps in the belief that weak merits can be helped by attacking opposing counsel, complaint about matters which have nothing whatever to do with this appeal. Two examples appear on pages 6 and 7 of the brief filed on behalf of defendants Dreyfus Corporation, et al. These refer to an incomplete deposition of plaintiff and to Interrogatories served by plaintiff. The thrust seems to be, not to show a lack of particularization in the Complaint, but to convince the Court that plaintiff's counsel is to be disliked.

If defendants had any real objections to the partial deposition or the Interrogatories, the place to have gone for a remedy is District Court. Significantly they refrained from doing so. Indeed, they neglected even to file the partial deposition until after the District Court record had been originally certified to this Court and appeal tactics dictated its use. If the dismissal is reversed and we return to District Court, they will, no doubt, have an opportunity to get rulings on these matters.

The fact is that neither the partial deposition nor the Interrogatories were on file until after Judge

Cannella had made all of the decisions now on appeal. Therefore, they had no bearing on those decisions and they are irrelevant now.

A point-by-point response to each such item in appellees' briefs would be of doubtful value on this appeal. However, we wish to register a general objection to irrelevant references and interpretations, and rely upon the belief that this Court will focus upon the real merits.

CONCLUSION

The two decisions being appealed should be reversed together with the Judgment of dismissal.

Respectfully submitted

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Of Counsel:
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
JAN. 20, 1975
S.D. OF N.Y.

THELMA WEBER,

Plaintiff,

-against-

74 Civ. 3415

REYNOLDS SECURITIES, INC., ALICE S. BREWER as Executrix under the Will of Hugh C. Brewer, and ALISON B. SLATER,

Defendants.

METZNER, D. J.:

Defendant Alison B. Slater moves to dismiss Counts One and Three of the amended complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., or, in the alternative, to direct the filing of a more definite statement pursuant to Rule 12(e), Fed. R. Civ. P. It is claimed that the complaint fails to plead the allegations of fraud with the particularity required by Rule 9(b), Fed. R. Civ. P.

Count One of the amended complaint alleges violations of the fraud provisions of the federal securities acts. There is no doubt that the scheme is fully set forth and easily withstands a motion by Brewer to dismiss bottomed on Rule 9(b).

EXHIBIT A

It is claimed that Brewer fraudulently induced plaintiff to deposit $1,000,000 in securities in an account at Reynolds in the name "Alison B. Slater," his daughter. The only questionsis whether the allegations as to Slater meet the required standard of particularity.

In this connection the complaint, in addition to alleging knowledge on the part of Slater of the fraudulent conduct, specifically sets forth two affirmative acts by her to aid in the successful operation of the scheme. These are giving a power of attorney over the account to plaintiff, and reporting on her income tax returns the transactions in the account with the taxes on the profits being paid to her by Brewer.

In Felton v. Walston & Co., No. 74-1581 (2d Cir. December 23, 1974), the court reaffirmed its interpretation in Shemtob v. Shearson, Hammill & Co., 448 F. 2d 442 (2d Cir. 1971) and Segal v. Gordon, 467 F. 2d 602 (2d Cir. 1972), stating that "'mere conclusory allegations to the effect that defendant's conduct was fraudulent or in violation of Rule 10b-5 are insufficient.'"

Id. at 1063. The allegations against Slater are not conclusory allegations.

Furthermore, a plaintiff "'can not be required to allege with particularity the manner in which individual defendants acted in concert . . . .'" Competitive Associates, Inc., v. Fire Fly Enterprise, Inc., 59 F.R.D. 336, 338 (S.D.N.Y. 1972), quoting Trussell v. United Underwriters, Ltd., 228 F. Supp. 757, 774 (D. Colo. 1964). Finally, it appears that allegations of fraud on information and belief without stating the basis thereof are proper in this circuit. Felton v. Walston & Co., supra at 1066 n.6.

The motion to dismiss Count One must be denied.

Count Three is not a fraud count, but a common law pendant claim for conversion of the assets of the Slater account. Rule 9(b) is not applicable to such a claim.

The motion is in all respect denied.

So ordered.

Dated: New York, N.Y.
January 20, 1975

CHARLES M. METZNER
U. S. D. J.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MAUREEN MOTHERWAY being duly sworn deposes and says:

I am not a party to this action. I am over 18 years of age and reside in Queens County, N.Y.C. On March 7, 1975, I served the Plaintiff-Appellant's Reply Brief upon the following attorneys at the following respective addresses by depositing copies of the same in post-paid properly addressed wrappers in an official depository under the exclusive care of the United States Postal Service within the State of New York:

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Sworn to before me this
7th day of March, 1975

Maureen Mathews

Dermot G. Foley

DERMOT G. FOLEY
Notary Public, State of New York
No. 03-1263750
Qualified in Bronx County
Commission Expires March 30, 1977